

NEXUS AND THE CONTRACT DISPUTES ACT

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Does a board of contract appeals or the Court of Federal Claims have jurisdiction over a breach of a government contract government if negligence is alleged in a claim, or does the Federal Tort Claims Act (28 USC § 1346(b)) control, which removes the jurisdiction under the Contract Disputes Act? The answer depends on the nexus between the alleged tortious contract and the government's obligations under the contract. *Bear Mountin Cutters, Inc. v. Dept of Agriculture*, CBCA 7323 (Sept. 8, 2022).

Bear Mountin received and accepted a resource order under its Blanket Purchase Agreement to clear lands affected by a fire. The order required that it provide a "Masticator" to assist in clearing brush affected by the fire. The order stated that the Government "shall not be liable for any loss, damage or destruction of [equipment used by contractor] except for loss, damage or destruction resulting from the negligence or wrongful act(s) of Government employees while acting within the scope of their employment."

When Bear Mountin reported to fire headquarters with the masticator, the Forest Service directed that it be walked (top speed 1.2 mph) up a remote road—even though the Forest Service allegedly was aware of threatening weather and of the impossibility of moving the masticator out of harm's way in an emergency. Further, the usual Forest Service heavy equipment boss, whose duties include scene safety, was not on the scene. Because of a breakdown in staffing and safety protocols, the contractor could not walk the masticator out when there was an emergency, and it was totaled. The contractor claimed that the Forest Service was grossly negligent and acted recklessly in directing it to walk in the masticator the day before the fire, and in directing the contractor to work in front of the approaching fire on the day the masticator was destroyed. Bear Mountin submitted a claim for \$452,000, the replacement cost of the masticator, and the agency denied it. On appeal, the Agency stated that the contract should be considered under the Federal Tort Claims Act, not the Contract Disputes Act, and asked for dismissal of the case.

In considering the motion for dismissal, the Civilian Board of Contract Appeals noted that the Board has jurisdiction of an action which primarily arises from a contract even though the loss may have resulted from the negligent manner in which the contract was performed. Jurisdiction of the Board exists where there is a "direct nexus between the Government's alleged tortious conduct and its obligations under the contract." The Board noted that the clause pertaining to damage of the masticator allocates risks between the parties and "sets forth performance obligations as a result of a contractual undertaking." These provisions that pertain to the equipment damages and who must pay for them, thereby control the rights and obligations of the parties. Therefore a sufficient nexus between the government's allegedly tortious conduct and breach of its contractual obligations exists so that the Board may exercise its jurisdiction over the appeal. The government's motion to dismiss was denied.

Takeaway: Even if the government's conduct is tortious, the Boards and Claims Court will have jurisdiction over a claim if there is a nexus between government conduct and the breach of the Government's contractual obligations.

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